



California Environmental Protection Association

June 22, 2018

JUN 25 2018

Via US Mail, Certified

Sanel Ljesnjanin
306 Gold Street, 15C
Brooklyn, NY 11201-3028

Uchenna Ukazim
7501 Hearst Road
Willits, CA 95490

Nick Barbieri
Nick Barbieri Trucking
Redwood Coast Fuels
North Bay Petroleum
3471 N. State Street
Ukiah, CA 95482

Re: 60-Day Notice of Violations and Intent to File Suit Under the Federal Water Pollution Control Act ("Clean Water Act")

To Officers, Directors, Operators, Property Owners and/or Facility Managers of 7501 Hearst Road, Willits, California:

The California Environmental Protection Association ("CEPA") provides this 60-day Notice of violations of the Federal Clean Water Act ("CWA" or "Act") 33 U.S.C. § 1251 *et seq.*, that CEPA believes occurred at 7501 Hearst Road in Willits, California ("the Site"). Pursuant to CWA §505 (33 U.S.C. §1365(a)), this Notice is being sent to you as the responsible property owners, landlords, officers, operators or managers of the Site.

CEPA is an environmental citizen's group established under the laws of the State of California to protect, enhance, and assist in the restoration of all rivers, creeks, streams, wetlands, vernal pools, and tributaries of California, for the benefit of its ecosystems and communities.



CWA section 505(b) requires that sixty (60) days prior to the initiation of a civil action under CWA section 505(a), a citizen must give notice of intent to file suit. 33 U.S.C. § 1365(b). Notice must be given to the alleged violator, the U.S. Environmental Protection Agency (“EPA”), and the State in which the violations occurred.

Sanel Ljesnjanin and Uchenna Ukazim (“Property Owners”) and Nick Barbieri Trucking, Redwood Coast Fuels and North Bay Petroleum (“Responsible Operators”) are hereby placed on formal notice by CEPA that after the expiration of sixty (60) days from the date this Notice was delivered, CEPA will be entitled to bring suit in the United States District Court against the Property Owners and Responsible Operators for continuing violations of an effluent standard or limitation, National Pollutant Discharge Elimination System (“NPDES”) permit condition or requirement, or Federal or State Order issued under the CWA (in particular, but not limited to, § 301(a), § 402(p), and § 505(a)(1)), as well as the failure to comply with requirements set forth in the Code of Federal Regulations.

As required by CWA section 505(b), this Notice of Violation and Intent to File Suit provides notice of the violations which have occurred and continue to occur at the Site. After the expiration of sixty (60) days from the date of this Notice of Violation and Intent to File Suit, CEPA intends to file suit in federal court against the Property Owners and the Responsible Operators under CWA section 505(a) for the violations described more fully below.

I. THE SPECIFIC STANDARD, LIMITATION, OR ORDER VIOLATED

As more fully described in Section III, below, CEPA alleges that in its operations of the Site, the Property Owners and Responsible Operators have committed ongoing violations of the substantive and procedural requirements of the Federal Clean Water Act, California Water Code §13377; the General Permit, the Regional Water Board Basin Plan, the California Toxics Rule (CTR) 40 C.F.R. § 131.38, and California Code of Regulations, Title 22, § 64431.

II. THE LOCATION OF THE ALLEGED VIOLATIONS

A. The Property

The location of the point sources from which the pollutants identified in this Notice are being discharged in violation of the CWA is 7501 Hearst Avenue in Willits, California.

B. The Affected Receiving Waters

This Notice addresses the violations of the CWA arising from the unlawful discharge of pollutants from the site directly into Rocktree Creek, a tributary of the Eel River Watershed. The Eel River eventually flows to the Pacific Ocean (“Receiving Waters”).

The Eel River and Pacific Ocean are waters of the United States. The CWA requires that water bodies such as the Eel River meet water quality objectives that protect specific “beneficial uses.” The North Coast Regional Water Board has issued the *North Coast Basin Water Quality Control Plan* (“Basin Plan”) to delineate those water quality objectives.

The Basin Plan identifies the “Beneficial Uses” of water bodies in the region. The Beneficial Uses for the Receiving Waters downstream of the Facility include: commercial and sport fishing, estuarine habitat, fish migration, navigation, preservation of rare and endangered species, water contact and noncontact recreation, shellfish harvesting, fish spawning, and wildlife habitat.

III. VIOLATIONS OF THE CLEAN WATER ACT

On or about December 12, 2017, a 1000-gallon Red Diesel tank was ordered by the Property Owners from Responsible Operator Redwood Coast Fuels, installed on the Property and filled with 1000 gallons of red diesel fuel on December 13, 2017.

On or about December 16, 2017, the storage tank installed on the Property by Redwood Coast Fuels failed and released approximately 700 gallons of red-dyed diesel fuel to the soil and groundwater of the Property, which subsequently reached Rocktree Creek, a water of the United States (“the Spill”).

Elevated levels of Petroleum Hydrocarbons, including benzene, toluene, ethylbenzene and xylenes were detected in water and sediment samples that LACO Associates, Inc. collected and analyzed on the Site between January and March of 2018. More information about the Spill can be found online at https://geotracker.waterboards.ca.gov/profile_report?global_id=T10000011248.

The Property Owners and Responsible Operators violated and are continuing to violate the CWA by discharging pollutants from the spill site into the creeks, creek tributaries and wetlands into groundwater that is hydrologically connected to nearby surface waters and by not fully correcting and remediating these violations.

Section 301(a) of the CWA, 33 U.S.C. §1311(a), prohibits the discharge of pollutants from a point source to waters of the United States except in compliance with, among other conditions, a National Pollutant Discharge Elimination System (“NPDES”) permit issued pursuant to §402 of the CWA, 33 U.S.C. §1342. Neither of the Property Owners, nor the Responsible Operators have an NPDES permit which authorized any of the discharges from the Spill described in this Notice.

The illegal discharges from the Spill contained pollutants, including benzene and red-dyed diesel fuel. The CWA definition of “pollutant” covers gasoline and diesel fuel discharges. *United States v. Hamel*, 551 F.2d 107, 110-11 (6th Cir. 1977).

According to documents provided by LACO and the Regional Water Board, these pollutants have already reached a tributary of Rock Creek at the locations described above. The

red-dyed diesel product also continues to flow both north and south through hydrologically connected groundwater to tributaries of Rock Creek, eventually ending up in the Pacific Ocean.

The CWA prohibits “any addition of any pollutant to navigable waters from any point source.” The CWA defines a “point source” as “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, or container from which pollutants are or may be discharged.” 33 U.S.C. 1362(14). The term “navigable waters” is defined in the CWA as “the waters of the United States.” 33 U.S.C. §1362(7). The Supreme Court has interpreted the term “navigable waters” to mean more than waters that are navigable-in-fact, and to include, for example, wetlands and related hydrological environs. *Rapanos v. United States*, 547 U.S. 715, 730-31, 735 (2006) (observing that navigable waters include more than traditionally navigable waters). “The touchstone for finding a point source is the ability to identify a discrete facility from which pollutants have escaped.” *Wash. Wilderness Coal v. Hecla Mining Co.*, 870 F.Supp.983, 988 (E.D. Wash. 1994).

Here, the point source was the ruptured 1000-gallon diesel tank which led to the contamination of the surrounding area. In addition, the areas soaked with and contaminated by the red-dyed diesel spilling from the tank are also point sources. The diesel fuel has not been removed, and the residue continues to pollute the surface waters and wetlands in violation of the Clean Water Act.

Second, the Spill Site discharged pollutants, including Petroleum Hydrocarbons, through hydrologically connected groundwater that carries the pollutants into the surface waters of Rock Creek and its tributaries, including the Eel River and the Pacific Ocean.

The EPA has stated repeatedly that the CWA applies to such hydrologically-connected groundwater discharges. 66 Fed. Reg. 2960, 3015 (Jan. 12, 2001) (“EPA is restating that the Agency interprets the Clean Water Act to apply to discharges of pollutants from a point source via ground water that has a direct hydrologic connection to surface water.”) *accord* 56 Fed. Reg. 64876-01, 64892 (Dec. 12, 1991) (“the Act requires NPDES permits for discharges to groundwater where there is a direct hydrological connection between groundwaters and surface waters.”) 55 Fed. Reg. 47990, 47997 (Nov. 16, 1990) (announcing stormwater runoff rules and explaining that discharges to groundwater are covered by the rule where there is a hydrological connection between the groundwater and a nearby surface water body).

In a 1998 site report, EPA stated that a documented ground water hydrological connection between a source and surface water discharge may be viewed as a conduit; or a discernible, confined and discrete conveyance.”, i.e. a point source. U.S. EPA, Report on Hydrological Connection Associated with Molycorp Mining Activity, Questa, New Mexico (Fed. 13, 1998). As a result, EPA has identified and regulated as point source conduits or contaminated areas that convey pollutants into groundwater that discharge directly to neighboring surface waters—precisely the situation we have here.

In addition to the EPA, the Ninth Circuit has held that contaminated and contaminating sites like this one are point sources, and an indirect discharge of a pollutant through ground water

which has a direct hydrological connection to navigable waters can support a theory of liability under the CWA. *Hawaii Wildlife Fund v. County of Maui*, 881 F.3d 754 (9th Cir. 2018).

Numerous courts nationwide support this reasoning. See, e.g. *Waterkeeper All., Inc. v. U.S. EPA*, 399 F.3d 486, 515 (2d. Cir. 2005) (upholding EPA's case-by-case approach to regulating feedlot pollutant discharges to surface waters through connected groundwater); *Quivira Mining Co. v. U.S. EPA*, 765 F.2d 126, 130 (10th Cir. 1985) (finding CWA coverage where discharges ultimately affected navigable-in-fact streams via underground flows); *San Francisco Herring Assn v. Pac. Gas & Elec. Co.*, 81 F.Supp.3d 847, 863 (N.D. Cal. 2015) (CWA jurisdiction over pollutant discharges through groundwater conduit to navigable waters); *Sierra Club v. El Paso Gold Mines, Inc.*, No. CIV.A.01 PC 2163 OES, 2002 WL 33932715, at *10 (D. Colo. Nov. 15, 2002) (citing EPA policy statement that "discharges from mine adits at historic or active mines including seeps and other groundwater discharges hydrologically connected to surface water from mines are point sources subject to CWA liability for any amount of unpermitted discharge"); *Washington Wilderness Coal v. Hecla Mining Co.*, 870 F. Supp. 983, 990 (E.D. Wash. 1994) ("since the goal of the CWA is to protect the quality of surface waters, any pollutant which enters such waters, whether directly or through groundwater, is subject to regulation" under the CWA).

The Spill Site qualifies as a continuing discharge so long as the red-dyed diesel product remains in the environment and/or continues to reach surface water and wetlands – either directly or through hydrologically connected groundwater. (See *Gwaltney of Smithfield, Ltd v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 67-70 (1987) "A CWA violation remains, for purposes of 505(a), so long as remedial measures have not been put in place to clearly eliminate the cause of the violation. A good or lucky day is not a state of compliance. Nor is the dubious state in which a past discharge issue is not recurring at the moment, but the cause of that problem has not been completely and clearly eradicated."

Nothing in the language of the CWA suggests that citizens are barred from seeking injunctive relief after a polluter has repaired the initial cause of the pollution. The CWA's language does not require that the point source continue to release a pollutant for a violation to be ongoing. The CWA requires only that there be an ongoing addition of pollutants to navigable waters, regardless of whether a defendant's conduct causing the violation is ongoing. *Upstate Forever v. Kinder Morgan Energy Partners, L.P.* 887 F.3d 637 (4th Cir. 2018) *Am. Canoe Assn v. Murphy Farms*, 412 F.3d 536, 539 (4th Cir. 2005) (finding continuous violation even where defendant took remedial efforts because the efforts were insufficient to eliminate the continuing likelihood of recurrence of violations); *Ohio Valley Envtl. Coal.*, 984 F. Supp. 2d at 598 ("one may continue to be in violation of the Clean Water Act even if the activities that caused the violations have ceased"); *Umatilla Waterquality Protective Assn, Inc. v. Smith Frozen Foods, Inc.*, 962 F. Supp. 1312, 1322 (D. Or. 1997) ("a discharge of pollutants is ongoing if the pollutants continue to reach navigable waters, even if the discharger is no longer adding pollutants to the point source itself"); *North Carolina Wildlife Federation v. Woodbury*, No. 87-584-CIV-5, 1989 WL 10517, at *2-*3 (E.D.N.C. April 25, 1989) (holding that a tract with unremediated dredged and fill material was a continuing discharge).

Furthermore, applicable Water Quality Standards (“WQS”) are set forth in the California Toxics Rule (“CTR”) and the Regional Basin Plan. Exceedances of WQS are violations of the CTR and the Basin Plan. Industrial storm water discharges must strictly comply with WQS, including those criteria listed in the applicable Basin Plan. (See *Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1166-67 (9th Cir. 1999).)

The Basin Plan establishes WQS for the North Coast area, and include but are not limited to the following:

- Waters shall not contain substances in concentrations that result in the deposition of material that cause nuisance or adversely affect beneficial uses.
- Waters shall not contain suspended material in concentrations that cause nuisance or adversely affect beneficial uses.
- Waters shall be free of changes in turbidity that cause nuisance or adversely affect beneficial uses.
- All waters shall be maintained free of toxic substances in concentrations that are lethal to or that produce other detrimental responses in aquatic organisms.
- Surface waters shall not contain concentrations of chemical constituents in amounts that adversely affect any designated beneficial use.

Accordingly, the Clean Water Act applies to the Property Owner and Responsible Operators’ unpermitted discharges from the Spill Site that are continuing to discharge contaminated pollutants over soil and through hydrologically connected groundwater into surface waters.

The violations discussed herein are derived from eye witness reports and records publicly available. These violations are continuing.

IV. THE PERSON OR PERSONS RESPONSIBLE FOR THE VIOLATIONS

The individuals and entities responsible for the alleged violations are Sanel Ljesjnanin, Uchenna Ukazim; and Nick Barbieri Trucking, Redwood Coast Fuels and North Bay Petroleum.

V. THE DATE, DATES, OR REASONABLE RANGE OF DATES OF THE VIOLATIONS

The range of dates covered by this 60-day Notice is from at least December 12, 2017, to the date of this Notice. CEPA may from time to time update this Notice to include all violations which may occur after the range of dates covered by this Notice. Some of the violations are continuous in nature; therefore, each day constitutes a violation.

VI. CONTACT INFORMATION

The entity giving this 60-day Notice is the California Environmental Protection Association (“CEPA”).

To ensure proper response to this Notice, all communications should be addressed as follows:

Gerard Duenas
CALIFORNIA ENVIRONMENTAL PROTECTION ASSOCIATION
5960 South Land Park Drive #513
Sacramento, CA 95822
(916) 760-7774
Email: cepa4cleanwater@gmail.com (emailed correspondence is preferred)

VII. RELIEF SOUGHT FOR VIOLATIONS OF THE CLEAN WATER ACT

As discussed herein, the Facility’s discharge of pollutants degrades water quality and harms aquatic life in the Receiving Waters. Members of CEPA live, work, and/or recreate near the Receiving Waters. For example, CEPA members use and enjoy the Receiving Waters for fishing, boating, swimming, hiking, biking, bird watching, picnicking, viewing wildlife, and/or engaging in scientific study. The unlawful discharge of pollutants from the Facility impairs each of these uses.

Further, the Facility’s discharges of polluted storm water and non-storm water are ongoing and continuous. As a result, the interests of CEPA’s members have been, are being, and will continue to be adversely affected by the failure of the Property Owners to comply with the General Permit and the Clean Water Act.

CWA §§ 505(a)(1) and 505(f) provide for citizen enforcement actions against any “person,” including individuals, corporations, or partnerships, for violations of NPDES permit requirements and for un-permitted discharges of pollutants. 33 U.S.C. §§ 1365(a)(1) and (f), §1362(5).

Pursuant to Section 309(d) of the Clean Water Act, 33 U.S.C. § 1319(d), and the Adjustment of Civil Monetary Penalties for Inflation, 40 C.F.R. § 19.4, each separate violation of the Clean Water Act subjects the violator to a penalty for all violations occurring during the period commencing five (5) years prior to the date of the Notice Letter. These provisions of law authorize civil penalties of \$37,500.00 per day per violation for all Clean Water Act violations after January 12, 2009, and \$51,570.00 per day per violation for violations that occurred after November 2, 2015.

In addition to civil penalties, CEPA will seek injunctive relief preventing further violations of the Clean Water Act pursuant to Sections 505(a) and (d), 33 U.S.C. § 1365(a) and (d), declaratory relief, and such other relief as permitted by law. Lastly, pursuant to Section

505(d) of the Clean Water Act, 33 U.S.C. § 1365(d), CEPA will seek to recover its litigation costs, including attorneys' and experts' fees.

VIII. CONCLUSION

The CWA specifically provides a 60-day notice period to promote resolution of disputes. CEPA encourages the Discharger, the Property Owner or their counsel to contact CEPA within 20 days of receipt of this Notice to be referred to CEPA's corporate counsel assigned to this matter to initiate a discussion regarding the violations detailed herein.

During the 60-day notice period, CEPA is willing to discuss effective remedies for the violations; however, if the Discharger wishes to pursue such discussions in the absence of litigation, it is suggested those discussions be initiated soon so that they may be completed before the end of the 60-day notice period. CEPA reserves the right to file a lawsuit if discussions are continuing when the notice period ends.

Very truly yours,

Original Signed by:
EDUARDO DUENAS

President/CEO

Copies to:

Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Executive Director
State Water Resources Control Board
P.O. Box 100
Roseville, CA 95812-0100

Jeff Sessions, U.S. Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001

Regional Administrator
U.S. EPA – Region 9
75 Hawthorne Street
San Francisco, CA, 94105